

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JOHN D. EVERETT,

Plaintiff,

v.

HAROLD CLARKE, *et al.*,

Defendants.

Case No. C07-5026RBL

REPORT AND
RECOMMENDATION TO
DISMISS COMPLAINT
WITHOUT PREJUDICE

Noted for April 13, 2007

This case has been referred to Magistrate Judge J. Kelley Arnold pursuant to 28 U.S.C. § 636(b)(1)(B). This matter comes before the court upon plaintiff's request to dismiss his complaint (Doc. 8). After reviewing plaintiff's motion, the undersigned recommends that the court GRANT the motion and dismiss this matter without prejudice pursuant to Rule 41(a).

Under Rule 41, a plaintiff has the right to voluntarily dismiss his case when no answer or motion for summary judgment has been filed by an adverse party. Rule 41(a)(1) specifically provides that dismissal as a matter of right can be foreclosed only by the filing of an answer or a motion for summary judgment. Roddy v. Dendy, 141 F.R.D. 261, 262 (S.D. Mississippi, 1992).

Mr. Everett is requesting dismissal based on the understanding that his civil complaint for monetary damages is premised on claims that raise the validity of his criminal conviction and/or sentence. The court previously explained to Plaintiff that "[e]ven a prisoner who has fully exhausted available state remedies has no cause of action under § 1983 unless and until the conviction or sentence is reversed, expunged, invalidated, or impugned by the grant of a writ of habeas corpus." Heck v. Humphrey, 114 S.Ct. 2364,

1 2373 (1994).

2 Accordingly, plaintiff's request should be GRANTED, and this matter should be dismissed without
3 prejudice. Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the
4 parties shall have ten (10) days from service of this Report to file written objections. *See also* Fed.R.Civ.P.
5 6. Failure to file objections will result in a waiver of those objections for purposes of appeal. Thomas v.
6 Arn, 474 U.S. 140 (1985). Accommodating the time limit imposed by Rule 72(b), the clerk is directed to
7 set the matter for consideration on **April 13, 2007**, as noted in the caption.

8 DATED this Tuesday, March 20, 2007.

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10 /s/ J. Kelley Arnold
11 J. Kelley Arnold
12 United States Magistrate Judge
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